IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHICAGO BRIDGE & IRON COMPANY,
Plaintiff and Appellant,
v.
STATE BOARD OF EQUALIZATION,
Defendant and Respondent.

B051542
(Super. Ct. No. C712283)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harvey A. Schneider, Judge. Affirmed.

Dennis A. Page and John M. Garrick, for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, Edmond B. Mamer, Supervising Deputy Attorney General, and David S. Chaney, Deputy Attorney General, for Defendant and Respondent.

Chicago Bridge & Iron Company (CB&I) sued the Board of Equalization of the State of California for a use tax refund. The trial court granted the Board's motion for summary judgment and CB&I appeals. We affirm.

FACTS

Between 1978 and 1982, CB&I (an Illinois corporation which designs and manufactures steel storage tanks) had several jobs requiring on-site installation in California. To perform those contracts, CB&I obtained standard-size steel plates from a non-California manufacturer and had the plates shipped directly to CB&I's fabricating plant in Utah. CB&I cut and shaped the plates into component parts (all the work was done in Utah) and

sold the remaining scrap metal to Utah scrap dealers. The tanks were then assembled and installed at the field sites in California.

CB&I timely filed California use tax returns for calendar years 1978 through 1982, reporting steel costs for its California contracts as the cost of the portions of the steel used in the finished tanks erected in California (and not including the portions cut away during construction in Utah and sold to Utah scrap dealers). It was (and is) CB&I's position that it ought not to pay a use tax on its cost for residual metal which was never used in California. Following an audit, the Board concluded that CB&I should have reported the total amount paid for all steel purchased for the California contracts, reduced only by the amount recouped from the sale of any scrap. Additional use taxes and penalties were assessed against CB&I.

CB&I paid the deficiency and, following denial of its request for a refund, filed suit against the Board. Cross-motions for summary judgment resulted in a determination by the trial court that the Board's position was correct and CB&I appeals from the judgment thereafter entered.

DISCUSSION

I.

We reject the Board's assertion that CB&I is collaterally estopped from litigating the issues raised in this case because identical issues were raised in a prior action in which the judgment is final (*Chicago Bridge & Iron Co.* v. *State Board of Equalization*) (B028787) abandonment filed Sept. 18, 1990). (See *Producers Dairy Delivery Co.*, v. *Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910; *People* v. *Sims* (1982) 32 Cal.3d 468, 484.) Our review of the record in the prior action (pursuant to the Board's request for judicial notice) reveals there was no final judgment until three months after judgment was entered in this case. We thereafter decide this case on its merits.

II.

CB&I contends it has accurately determined the steel costs for its California contracts by computing the weight of the steel and reporting for California use tax purposes the cost of that portion of the steel actually used for subassemblies which were then installed at California construction sites. Stated otherwise, CB&I takes the position that it ought to be taxed in California for only that portion of the material actually installed in the state, notwithstanding that more material (the cut-away sections sold for scrap) was ordered specifically for the California contracts. The Board contends CB&I is required to report its total cost for the steel purchased for the California contracts, reduced only by the amount received by CB&I as payment from scrap dealers. We agree with the Board.

A use tax is an "excise tax . . . imposed on the storage, use, or other consumption in this state on tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state . . ." (Rev. & Tax. Code, § 6201).[1] Use taxes were first levied under the California Use Tax Act of 1935 (Stats. 1935, ch. 361, § 3, pp. 1298-1299) and, coincidentally, one of the first challenges to the statute was pursued by CB&I.

In *Chicago Bridge & Iron Co. v. Johnson* (1941) 19 Cal.2d 162, CB&I claimed it was not liable for any use tax at all because it did not purchase tanks for storage or use in California but merely manufactured them.[2] Our Supreme Court disagreed, explaining

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[1]All section references are to the Revenue and Taxation Code and all regulation references are to the California Code of Regulations.

[2]The nature of CB&I's business has not changed very much in the last 50 years. In 1941, the Supreme Court explained that CB&I purchased steel outside of California, manufactured the raw materials into tank component parts at its plants outside of California, and assembled and installed those parts at their California destinations. (*Chicago Bridge & Iron Co. v. Johnson, supra,* 19 Cal.2d at pp. 163-164.) And the substance of the applicable statute has not changed. The original Use Tax Act provided that "[a]n excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal

that the tax was based on CB&I's use in California of the materials it purchased elsewhere. "It acquired the raw materials out of which it manufactured or fabricated those completed parts, and it is the storage and use of those materials upon which the tax is based. *The tax was computed upon the cost, that is, the sales price of these materials to [CB&I], and that is the price which it paid for them. The fabrication and construction of these materials into the completed articles undoubtedly enhanced their value, but the tax is not calculated on that value. It is based on the sales price to [CB&I] of the materials which were used to fabricate the finished product which materials were undeniably purchased by [CB&I].*" (*Id.* at p. 167, emphasis added.)

In apparent anticipation of the argument CB&I asserts today (that it can't be taxed for that portion of property which is not actually "used" in California), the Supreme Court went on to explain that "those materials which were purchased by [CB&I] to fabricate tanks specifically to fulfill contracts or orders for tanks in California, were purchased for use, storage or other consumption in this state. *Those materials were designed for the purpose of being used by [CB&I] to erect tanks on its customer's premises in California in compliance with its contractual obligation.* To say that in ascertaining whether the tax applies, one may not look through the fabrication or manufacture to the purchase of materials used in that process and conclude that such purchase was for storage or use in California, is to sacrifice substance for form. The true reason and purpose for purchasing the materials was not merely the fabrication thereof into tanks.

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property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State . . . ." (Stats. 1935, ch. 361, § 3, pp. 1298-1299.)

The only thing that has changed is CB&I's argument, but not very much. Instead of focusing on the word "manufacture" as it did in 1941, CB&I now focuses on the word "used" and contends it can only be taxed on property "used" in the State of California, an argument expressly rejected in *Chicago Bridge & Iron Co. v. Johnson, supra*, 19 Cal.2d 162. The somewhat incredible failure of both parties to even mention *Chicago Bridge & Iron Co. v. Johnson* may explain the redundancy.

"In regard to the portion of materials purchased by [CB&I] and retained as stock in its plants outside this state to be used in the construction of tanks as its business might require, it is clear that in order that the object and purpose of the Use Tax Act may not be frustrated, it must be concluded that they were subject to the use tax. Those materials were purchased for use, storage or other consumption in this state. While it is true that they were not acquired with the express purpose of performing any specified contract or order, [CB&I] was engaged in the business of selling and constructing tanks in California. . . ." (*Id.* at p. 168, emphasis added.)

In *Chicago Bridge & Iron Co. v. Johnson*, there remained a possibility that the excess material might someday be used by CB&I on another California job. (*Id.* at p. 169.) Although the parties' failure to cite or discuss that case means they have not addressed the factual distinction in this case — here the scrap was sold to a Utah dealer, not stored, eliminating the possibility that CB&I might bring it into California — we are satisfied that the distinction is one without a difference. To assert on this appeal that sale of the scrap in Utah destroyed the contingency relied on by the Supreme Court, CB&I would have had to prove in the trial court that, at the time it purchased the steel, it intended to use it outside of California. And it would not have been enough to show that it had no intention of using the scrap in California because, by the nature of CB&I's business, there would have remained the possibility that it might sometime be used here. (*Western Contracting Corp.* v. *State Board of Equalization* (1968) 265 Cal.App.2d 568, 575.)

As the court explained in *Western Contracting Corp.*, "[w]ere the rule otherwise a company that operates in many states could avoid the payment of use tax in any state by demonstrating that it had not decided in which state to use the purchased products at the time of the purchase." (*Ibid.*) Accordingly, CB&I had the burden to prove not only that the Board's assessment was wrong but also to prove the basis for a correct assessment (*People* v. *Schwartz* (1947) 31 Cal.2d 59, 64-66) and its failure to present proof of its intent at the time of purchase (as well as its failure to

assert this position on appeal) defeats its attack on the Board's determination.

It follows that the Board correctly computed CB&I's use tax base as the cost of the steel purchased by CB&I for the California contracts, reduced only by the amounts received by CB&I for scrap sales. This result is consistent not only with existing interpretations but also with the purpose of the use tax — to place local retailers, who must pay a sales tax computed as a percentage of gross receipts on all retail sales (§ 6051; *Lockheed Aircraft Corp.* v. *State Bd. of Equalization* (1978) 81 Cal.App.3d 257, 265), on an equal footing with their out-of-state competitors who are not required to pay sales tax. (*Burroughs Corp.* v. *State Bd. of Equalization* (1984) 153 Cal.App.3d 1152, 1159.)

As the Court explained in *Chicago Bridge & Iron Co.* v. *Johnson, supra*, 19 Cal.2d at p. 165, if the materials were purchased in California and used in a plant maintained here for the manufacture of tanks, the sale of the materials to CB&I would be subject to the California sales tax. If the complete coverage and complementary nature of the sales tax and the use tax are to be preserved, it must be true that the materials are subject to use tax when purchased and fabricated elsewhere even though their form may be altered by the reason of the fabrication.

III.

We summarily reject CB&I's contention that the Board's reliance on Regulation 1521(b)(6)(C) to support its application of a use tax in this case deprives CB&I of its due process rights. Aside from the fact that the regulation benefits CB&I by creating a *deduction* for scrap resale proceeds, it is absolutely consistent with the Supreme Court's interpretation of the statute. The Board is relying on the statute, as interpreted by the courts, not on a regulation.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

VOGEL (MIRIAM A.), J.

We concur:

SPENCER, P.J.

ARANDA, J.*

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*Assigned by the Chairperson of the Judicial Council.

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